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No. 78.

IN THE

Supreme Court of the United States

October Term, 1928.

THE UNITED STATES,

Petitioners,

vs.

AMOS D. CARVER, S. E. TURNER, CLIFFORD N. CARVER, SCOTT BLANCHARD, P. B. BLANCHARD, JAMES B. PARSE, A. N. BLANCHARD, W. A. BLANCHARD,

Respondents.

On Writ of Certiorari to the Court of Claims.

Brief For The Respondents.

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BRIEF FOR THE RESPONDENTS.

Opinion Below.

The opinion of the Court of Claims (R., 13) is reported in 64 Ct. Cl. 1.

Jurisdiction.

The original judgment of the Court of Claims was entered January 17, 1927 (R., 7). On March 14, 1927, defendants' counsel filed a motion for a new trial (R., 16). On December 19, 1927, said motion was overruled, but the Court entered an order modifying the judgment (R., 16). The petition for certiorari was filed February 25, 1928 (R., 16) and granted April 13, 1928 (R., 17). The jurisdiction of this Court is conferred by Section 3 (b) of the Act of February 13, 1925.

The Questions Presented.

Respondents, owners of the ship *Betsy Ross*, chartered this vessel in August, 1917, to proceed from Seattle, Washington, to New Caledonia, and to transport therefrom to New York a cargo of chrome ore. Before the ship sailed from Seattle, the Shipping Board was requested to approve the charter, and this was done in writing. After the ship had undertaken the voyage, and had proceeded as far as Melbourne, Australia, the Shipping Board, in violation of its approval of the ore charter, directed that the ship be held in Melbourne for more than a month, and then ordered the cancellation of the ore charter, requesting the Australian authorities not to clear the ship unless she be loaded with wheat for the United States. However, no charter to carry wheat was offered by the Shipping Board, or any agent representing the Board. Respondents on their own responsibility and in mitigation of damages, obtained a cargo of wheat from the *Food Administration Grain Corporation* (a Delaware corporation) and received as freight about one third the amount they were to receive for transporting the ore, and suffered a loss, by reason of the cancellation of their ore charter, of $113,216, for which amount a judgment was rendered by the Court of Claims.

The questions presented are:

(1) Whether this *destruction* of respondents' contract constituted a "taking" of their property, entitling the respondents to just compensation under paragraph "(e)," (and the next succeeding two paragraphs), of the Emergency Shipping Fund provisions of the Shipping Act of June 15, 1917, and/or,

(2) Whether the respondents are entitled to just compensation under paragraphs "(a)," and "(b)" (and the two paragraphs immediately following paragraph "(e)"), of said Act, by reason of the "suspension" and "cancellation" of their ore contract—even if paragraph "(e)" did not apply. *(Footnote.)

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*The introductory statements appearing in the Government's brief under the caption, "The Question Presented" (p. 2), are to the effect that respondents made an agreement with the Shipping Board to bring back the cargo of wheat from Australia, and thereby relinquished to the Shipping Board the claim for the destruction of the ore charter. Thus the judgment of the Court of Claims in this case is made to appear absurd, because, if this were so, the ruling in *American Smelting and Refining Company v. United States*, (55 Ct. Cl. 466, affirmed 259 U. S. 75) would clearly apply. However, the above question of fact was urged at great length in the case at bar before the same five judges of the Court of Claims, who had previously decided the *American Smelting and Refining Company* case. The Court concluded that no such agreement was ever made by respondents with the Shipping Board, and that the *American Smelting and Refining Company* case which was strongly urged upon the Court had no place for application. We therefore respectfully ask that the conclusion of the Court of Claims on this question of fact be regarded as final.

The Statute Involved.

The provisions of the Act just mentioned are as follows *(see footnote):

> "The President is hereby authorized and empowered, within the limits of the amounts herein authorized:
>
> "(a) To place an order with any person for such ships or material as the necessities of the Government, to be determined by the President, may require during the period of war and which are of the nature, kind and quantity usually produced or capable of being produced by such person.
>
> "(b) To modify, suspend, cancel, or requisition any existing or future contract for the building, production, or purchase of ships or material.
>
> "(c) To require the owner or occupier of any plant in which ships or materials are built or produced to place at the disposal of the United States the whole or any part of the output of such plant, to deliver such output or part thereof in such quantities and at such times as may be specified in the order.
>
> "(d) To requisition and take over for use or operation by the United States any plant, or any part thereof without taking possession of the entire plant, whether the United States has or has not any contract

*The authority herein conferred upon the President was delegated to the Shipping Board under Executive Order of July 11, 1917, No. 2664 (R., 5, 6).

or agreement with the owner or occupier of such plant.

"(c) To purchase, requisition, or take over the title to, or the possession of, for use or operation by the United States any ship now constructed or in the process of construction or hereafter constructed, or any part thereof, or charter of such ship.

"Compliance with all orders issued hereunder shall be obligatory on any person to whom such order is given, and such order shall take precedence over all other orders and contracts placed with such person. If any person owning any ship, charter, or material, or owning, leasing, or operating any plant equipped for the building or production of ships or material shall refuse or fail to comply therewith or to give to the United States such preference in the execution of such order, or shall refuse to build, supply, furnish, or manufacture the kind, quantities or qualities of the ships or material so ordered, at such reasonable price as shall be determined by the President, the President may take immediate possession of any ship, charter, material or plant of such person, or any part thereof, without taking possession of the entire plant, and may use the same at such times and in such manner as he may consider necessary or expedient.

"Whenever the United States shall cancel, modify, suspend or requisition any contract, make use of, assume, occupy, requisition, acquire or take over any plant or part thereof, or any ship, charter, or material, in accordance with the provisions hereof, it shall make just compensation therefor, to be determined by the President; and if the amount thereof so de-

termined by the President, is unsatisfactory to the person entitled to receive the same, such person shall be paid seventy-five per centum of the amount so determined by the President and shall be entitled to sue the United States to recover such further sum as, added to said seventy-five per centum, will make up such amount as will be just compensation therefor, in the manner provided for by section twenty-four, paragraph twenty, and section one hundred and forty-five of the Judicial Code.

"The President may exercise the power and authority hereby vested in him, and expend the money herein and hereafter appropriated through such agency or agencies as he shall determine from time to time: *Provided*, That all money turned over to the United States Shipping Board Emergency Fleet Corporation may be expended as other moneys of said corporation are now expended. All ships constructed, purchased, or requisitioned under authority herein, or heretofore or hereafter acquired by the United States shall be managed, operated, and disposed of as the President may direct."

Statement of the Case.

Between March 19, 1917, and October 8, 1917, the respondents expended the necessary money for the construction of a schooner called the "Betsey Ross." Before the vessel was completed (by a shipyard at Tacoma, Washington), the respondents entered into a charter on August 30, 1917, with the Mutual Chemical Company of America, to transport to New York on this ship, a cargo of chrome ore from New Caledonia (some 800 miles northeast of Mel-

bourne, Australia). At the same time and as a condition of this charter, the respondents entered into a charter with Messrs. J. J. Moore and Company of San Francisco for the outward voyage, to take a partial cargo of lumber from Chemainus, British Columbia, to Melbourne (R., 8). Before undertaking this voyage, so hazardous at that time, the respondents desired the assurance of the Shipping Board, that they, the respondents, would be permitted to carry out their charter to bring back the ore. Accordingly, before the ship sailed from Puget Sound, the respondents applied to the Shipping Board for, and received, their written approval for carrying out this ore charter (R., 9). Thereafter the vessel took aboard sufficient lumber, and other supplies, to enable her crew to build trunks in, and otherwise condition, the ship for the transportation of the ore. A part of this work was done during the outward voyage to Melbourne, and the material for thus especially equipping the ship for transporting the ore, cost the respondents $5,889.35.

The vessel arrived in Melbourne March 9, 1918, was conditioned, and made ready to sail for New Caledonia on April 10, 1918. However, when the master applied a few days prior thereto for his clearance papers "the commonwealth authorities declined to grant clearance, advising plaintiffs' agent at Melbourne that this action was taken at the request of the United States Shipping Board" (R. 10, Finding VIII). It had developed that prior to April 5, 1918, certain officials of the Shipping Board and U. S. War Industries Board and of the British and Australian governments had entered upon discus-

sions as to directing that the "Betsey Ross" should return to an American port with a cargo of wheat. There were differences of opinion as to what action should be taken, and these negotiations continued until May 9, 1918 (R. 10, F. VII). Accordingly, the Australian authorities continued to decline to grant clearance to the master of the "Betsey Ross," advising him from time to time that they were acting under the directions of the United States Shipping Board. On May 9, 1918, the respondents were advised that the vessel was ordered by the United States Shipping Board to abandon her chrome ore charter, and that she would not receive her clearance from Melbourne unless she be loaded with wheat. Thus, the vessel's owners were left by the Shipping Board under the handicap described, and the consequent necessity of accepting the best terms which might be offered to them for a return cargo of wheat. But no terms were ever offered by the Shipping Board, or any other person or persons acting as agent for, on behalf of, the Shipping Board or the United States (*infra*, 19).

Pending the above, the vessel remained idle at Melbourne during the period of 30 days between April 10 and May 9, 1918, at the expense of the respondents (R., 4). The fair and reasonable value of the vessel at that time was $500 per day or $15,000.00 for the period of her detention (R., 4).

Shortly thereafter, on May 15, 1918, the respondents having the opportunity, accepted an offer of the Food Administration Grain Corporation, a commercial corporation, organized under the laws of Delaware (*infra*, p. 19), for the

"Betsey Ross" to return to the United States with wheat (R., 4). The Grain Corporation paid the respondents for the transportation of said cargo of wheat $63,784.

The amount which the respondents would have earned if they had been permitted to carry out their chrome ore charter would have been $177,000. The contract so provided (R., 12, F. IX).

The respondents filed a petition for just compensation in the Court of Claims, under the provisions of the said Emergency Shipping Act, claiming the foregoing three items of loss, namely (a) the $5,889.35 for the cost of building the ore trunks and otherwise conditioning the "Betsey Ross" for carrying the chrome ore; (b) $15,000 for the value of the said ship during the period of detention between April 10 and May 9, 1918, while she was held at Melbourne under orders of the Shipping Board pending the decision that the ore charter must be cancelled and (c) $113,216 the value of the ore charter, measured by the difference between what respondents would have earned under the ore charter, $177,000, and what they were paid by the Grain Corporation, $63,784, for transporting wheat.

The Court of Claims entered judgment for the respondents for the third item only, $113,216 with interest, and disallowed the first and second items on the ground that the respondents were relieved from performing the chrome ore charter, and hence were not entitled to claim the other two items of their loss (R., 15).

ARGUMENT.

POINT I.

There was a destruction by the Shipping Board of respondents' ore contract, which amounted to a "taking," and Section "(e)" and the two following paragraphs of the act, apply.

The ground on which the respondents principally rely in respect of the authority conferred upon, and exercised by, the Shipping Board, is found in subsection "(e)," (and the two following paragraphs) of the Act. By this subsection the Shipping Board was authorized to *take* either the respondents' ship, or "the charter of such ship." The application of this subsection to the item of the claim for the value of the ship while she was held in Melbourne for more than a month at respondents' expense is clear. Certainly, as to this item of loss, the Court of Claims had jurisdiction under subsection "(e)" and the two following paragraphs, because the general law is therein expressly recognized, namely, that private property or the possession of it may not be taken without compensation. (The Constitution, 5th Amendment. See also, *De Keyser's Hotel Ltd. vs. The King*, 88 L. J. Ch. (1919), 415). This was not disputed in the Court of Claims as that Court points out in its opinion (R., p. 15). The principle argument of Government's counsel in the Court below rested almost entirely upon a technical discussion as to what would constitute a "taking." Thus, while the Shipping Board and Government's counsel admitted the retention of respondents' ship, and

the order for the cancellation of her charter, they argued that they did not thereby *take* anything from respondents. In reply to this the respondents respectfully contend that no cases are reported which better justify the application of the rule that a destruction of property may amount to a "taking." "A right may be taken by simple destruction for public use." (*Duckett vs. United States*, 266 U. S. 149, 151; *United States vs. Welch*, 217 U. S. 338). "You *take my house*, when you do *take the prop* that does sustain my house" (*The Merchant of Venice*, Act IV).

But there is another view of the application of this subsection "(e)" which seems also decisive of the merits of this controversy. The Shipping Board was clearly authorized by this subsection to take the ship's charter, that is, consistent with their own agreement already made with the respondents, they were authorized to say to the respondents: "We will pay you the same amount to bring back wheat in your ship, which she is to receive for bringing back the ore." But the Shipping Board, instead of this treated the respondents in a most inequitable manner. They offered no help whatever to provide the ship with a cargo of wheat. The Director of Operations of the Shipping Board at that time, Mr. E. F. Carry, who is now president of the Pullman Company, and under whose authority the ore charter was cancelled, testified in this case, and expressly stated that the treatment accorded the respondents was "atrocious," to use his own language. The Board held the ship in Melbourne for thirty odd days, and then ordering the cancellation of her charter, left the respond

ents in that distant port to meet their difficulties as best they might. In doing this the Shipping Board repudiated its own written agreement with the respondents that the ore charter might be carried out. Accordingly, the respondents contend that what was clearly the Shipping Board's duty to them may be regarded, in a court of equity, as having been done, "upon the known principle that equity will, for the purposes of justice, treat that to have been done which ought to have been done" (*Taylor vs. Longworth*, 14 Peters 172, 177). It may be noted that what the Court of Claims did was to allow the respondents only the difference between the ore charter and what they received from the Grain Corporation for bringing back the wheat, eliminating all other items, so the Government cannot claim, and does not claim any inequity. The respondents were entitled to this, and the Shipping Board, in honor of their own agreement, ought to have assumed this obligation then and there, as Congress authorized and intended they should do.

POINT II.

There was a "suspension" and "cancellation" by the Shipping Board of the ship's ore charter, and Section "(a)", "(b)", and the two paragraphs immediately following Section "(c)", also conferred jurisdiction on the Court of Claims to have awarded just compensation.

The action of the Shipping Board in holding the plaintiff's ship in Melbourne for upwards of a month, and in [illegible] the Australian au-

thorities to refuse clearance to the ship, and ordering the cancellation of her charter, was an "order" for a ship within the meaning of Subsection "(a)" of the statute. The Government's counsel hardly mention the application of this subsection, but by implication appear to say that it refers only to orders for the *construction* of a ship. However, the authority conferred by Subsection "(a)," "*to place an order* with any person *for such ships* * * * which are of the nature, kind and quantity usually produced or capable of being produced by such person," are not the words which would be employed to mean only an order for the *building* or *construction* of a ship. The persons referred to in this Section "(a)" as capable of "producing" a ship, were the ship-owners as well as the ship-builders, because the word *build* and the word *construct* are so customarily employed in connection with ships that it is reasonable to suppose that one of these words would have been used if its generally accepted meaning alone was intended. On the other hand, the word "produce" is a more comprehensive term, and in its usual sense applies to the act of supplying or making available for use a completed ship. Referring to a dictionary on the authority of *Nix v. Hedden* (149 U. S. 304), there will be found among other synonyms of the word "*produce*," the words *supply* and *furnish*. Accordingly, the persons intended to be included in this Subsection "(a)" of the act as capable of "producing" a ship, were not only those who could *build* but also those those who could furnish or otherwise make available a ship for use.

The foregoing interpretation is consistent with the next succeeding Subsection "(b)" of the

statute, which expressly indicates a distinction between "building" and "production." Furthermore, the wording of the paragraph immediately following Subsection "(c)" shows that the "orders" authorized by the statute were intended to include the requirement "to *build, supply furnish* a ship as follows:

> "Compliance with all orders issued hereunder shall be obligatory on any person to whom such *order* is given, and such *order* shall take precedence over all other *orders and contracts* placed with such person. *If any person owning any ship, charter or material* * * * shall refuse or fail to comply therewith, or to give to the United States such preference in the execution of such order, *or shall refuse to build, supply, furnish, or manufacture the kind, quantities or qualities of the ships or material so ordered*, at such reasonable prices as shall be determined by the President, the President may take immediate possession, etc."

Accordingly, when the Shipping Board assumed control of the plaintiffs' ship, and ordered the suspension and cancellation of her ore charter, it was reasonably within the exercise of the authority conferred by Subsection "(b)" "to modify, *suspend, cancel* or requisition any existing or future contract for the building, *production*, or purchase of ships or material."

The Government's counsel cannot reasonably deny, that Congress intended by the foregoing to provide that just compensation should be made for the suspension and cancellation of a contract for the "building" of a ship, but they imply to Congress the extraordinary in-

tent of favoring the owner of a contract for an uncompleted ship, over the owner of a contract pertaining to a completed ship. But in this contention the Government's counsel are not supported by the debates in Congress concerning the provisions of the Act at the time it was up for passage. These debates show it was the purpose of Congress to give to the Shipping Board, through the President, a sovereign power to do with ships, or ships under construction, *or contracts affecting either*, anything thought necessary for governmental purposes. There is no intimation that the owners of *contracts* for ships under construction were to be favored over the owners of contracts pertaining to completed vessels.

The following remarks of the Chairman of the Appropriation Committee of the House indicates the unlimited scope of the Act, and it will be noted that in his statements about the *suspension* and *cancellation* of private contracts, there is no suggestion that these terms were intended to apply only to contracts for ships in process of construction:

> "The proposed amendment which the House is asked to adopt is simply the rearranging the Senate amendment in more logical form and differs from it in four principal respects: First, it gives power to *suspend* contracts as well as to cancel, modify or requisition. In the Senate provision there was no authority to *suspend* a *contract between private parties*, which might interfere with the Government requisitioning *or requiring work to be done*."
>
> * * * * *
>
> "This legislation is of a very radical, unique, and unusual character. It con-

> fers the most comprehensive powers *ever proposed* upon the President of the United States. It authorizes him to requisition the entire output of a factory, to take over ships, *to cancel contracts*, to assume contracts, *to suspend contracts*, to operate those ships * * *" (Cong. Rec., Vol. 55, Part 3, p. 3015).

If the narrow interpretation sought to be placed on this statute by the Government's counsel were the correct one, this legislation would not be extraordinary at all—it would not be the slightest enlargement upon the 5th Amendment to the Constitution in respect of the obligation to make just compensation for the "taking" of private property.

Accordingly, it follows that the plaintiffs are entitled to just compensation for their losses on account of the authority so exercised by the Shipping Board, under the final paragraph of the act which states:

> "Whenever the United States shall *cancel*, modify, *suspend*, or requisition *any* contract, make use of, assume, occupy, requisition, acquire or *take* over any plant or part thereof, or *any ship*, *charter*, or material, in accordance with the provisions hereof, it shall make just compensation therefor. * * *"

POINT III.

The decision in this case is justified by the facts, peculiar to it, including the Shipping Board's retraction from its own agreement with respondents, and in any event there is no question of a precedent involved, for the following reasons:

(1) The Emergency Shipping Fund provisions of the Act under consideration were repealed by Section 2, Chapter 250, of the Merchants Marine Act of June 5, 1920 (41 Stat. 988), and hence the question presented is not a live one in the sense that it involves the application of an existing statute.

(2) By reason of the six-year statute of limitations, no further suits similar to the one at bar may be commenced (Jud. Code, No. 156; 36 Stat. 1139), and furthermore there are no similar claims now in litigation (R., 3).

(3) The decision of the Court of Claims is entirely consistent with its interpretation of the statute involved, in other cases, particularly *Meyer Scale & Hardware Co. v. United States* (57 Ct. Cls. 26), which will be mentioned further below (*infra*, p. 20).

Concerning Authorties Cited in Petitioners' Brief.

Four cases are cited in the petitioners' brief, but we respectfully say that none of these cases applies for reasons which will be briefly stated.

In *Omnia Company vs. United States*, (261 U. S. 503), a claimant was denied compensation for

the frustration of a contract which gave claimant the opportunity to purchase a large quantity of steel from a steel plant. The damages claimed were held to be too remote under the circumstances that claimant had made no payments under the contract, and the United States had not had any direct dealings with claimant or its property. But the circumstances of the case at bar are essentially different. The Shipping Board held respondents' ship in Melbourne for a considerable period and ordered her charter to be cancelled in violation of an agreement, which respondents had relied upon, and incurred heavy expenses in carrying out for more than five months.

The American Smelting and Refining Company vs. United States, was first decided by the Court of Claims (55 Ct. Cl. 466, *affirmed* 259 U. S. 75), and its application in the case at bar was urged at great length before the Court of Claims. However, the Court decided from the record, as a matter of fact, that the agreement between the respondents and the Grain Corporation was an independent transaction entirely without the intervention of the Shipping Board. Accordingly, in arguing the application of this case to the present one the Government's counsel fail to take into consideration an important fact, as the Court of Claims correctly viewed it, namely that no terms were offered by the Shipping Board after the cancellation of the ore contract, and hence there was nothing the respondents could do other than accept the best terms they could obtain from a third party. The Grain Corporation was a commercial corporation organized under the laws of

Delaware* (footnote), and it had no identity in fact or law with the Shipping Board, and in a legal sense it had no identity with the United States (*Bank of Georgia vs. United States*, 22 U. S. 333), although the United States owned the stock of the corporation.

The Board issued orders to the Australian authorities not to clear the ship unless she be loaded with wheat, and under that handicap left the respondents to shift for themselves. Hence, the Board not offering in any way a substitute charter to the respondents, and not being a party to the agreement between them and the Grain Corporation, the respondents had a right to take such hire as was offered by a third party without relinquishing their claim for the immediate and direct losses occasioned by the Shipping Board's intervention. Otherwise, any agreement by which a party may contract with a third party in mitigation of damages would serve to release the wrong doer for the breach of his contract.

The decision in *Union Petroleum Co. vs. United States* (18 F. [2d] 752), has to do with a state of facts quite similar in principle to those in the *Omnia* case, and accordingly, the claim was held to be too remote.

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*The "Food Administration Grain Corporation" was organized under the laws of Delaware, pursuant to Executive Order No. 2681 (August 14, 1917), under the provisions of the Food Control Act of August 10, 1917 (40 Stats., 279).

The judgment of the Court of Claims herein is consistent with the decision of that Court in *Meyer Scale and Hardware Co. vs. United States* (57 Ct. Cls. 26). While the facts in the *Meyer Scale* case are not similar to those under consideration, the Court of Claims in that case went exhaustively into the legislative history of the Act, stating that this was done in anticipation of other cases to arise, requiring the application of the Statute in question, and in answer to the same arguments for the narrow construction contended for in the case at hand, the Court said:

> "The words, '*modify*,' '*suspend*,' '*cancel*' and '*requisition*' are each of plain, well-understood meaning and each has its proper function in the accomplishment of the intended purpose. Combined, they covered the whole field of necessary operations so far as contracts were concerned, to the end that they might be found necessary to the accomplishment of governmental purposes. • • •
>
> "The Act in question provided for compensation in case the Government should exercise powers conferred as to *cancelling, modifying, suspending or requisitioning contracts*, taking over plants, etc., *and the measure is 'just compensation.'*"

Conclusion.

A similar act of Parliament has been construed to cover the losses from the destruction of a private contract, in a case which did not involve such a direct and immediate loss as the present one, because there had been no previous agreement on the part of the governmental

agency. (*Elliott Steam Tug Co. vs. The Shipping Comptroller* [1922], 1 K. B. 127).

The judgment of the Court of Claims sustains the principle that the respondents are entitled to be placed in the position they would have been in if the Shipping Board had kept its agreement and not cancelled the ore charter. The judgment does not place the respondents in this position by a wide margin, because they were allowed nothing for the expropriation of their ship in Melbourne, and other items of expense attributable directly to the Shipping Board's actions. However, the judgment is right in principle, and Government's Counsel admit that no inequity has been done. (*Brief in Support of Petition for Writ*, p. 9). If they desired to have this ship bring back wheat, they should have paid what the services were worth, instead of cancelling the respondents' charter and leaving them more or less helpless in the hands of a third party. This was an abuse of authority and an implied promise arose under the circumstances irrespective of the Shipping Board's violations of its own agreement.

For the reasons stated, it is respectfully asked that the judgment be affirmed.

Respectfully,

FRANK E. SCOTT,
Attorney for Respondents.

The Munsey Building,
Washington, [illegible], 1928.